

PROPOSED AMENDMENTS TO THE
CALIFORNIA CODE OF REGULATIONS
TITLE 23. WATERS
DIVISION 3. STATE WATER RESOURCES CONTROL BOARD
CHAPTER 18. PETROLEUM UNDERGROUND STORAGE TANK CLEANUP
FUND REGULATIONS
ARTICLE 7. ORPHAN SITE CLEANUP ACCOUNT

INITIAL STATEMENT OF REASONS

FEBRUARY 2006

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF FINANCIAL ASSISTANCE**

Chapter 18. Petroleum Underground Storage Tank Cleanup Fund Regulations
Article 7. Orphan Site Cleanup Account

Technical, Theoretical, and Empirical Study, Report, or Similar Document Relied Upon

The State Water Resources Control Board (State Water Board) did not rely on technical, theoretical, or empirical studies, reports, or similar documents in proposing these regulations. The proposed regulations do not mandate the use of specific technologies or equipment.

Reasonable Alternatives to the Proposed Regulations

No alternatives would be more or equally effective in carrying out the purpose for which the proposed regulations are intended or less burdensome to affected persons. The State Water Board did not consider any alternatives to the proposed regulations. The State Water Board did not consider any alternatives that would lessen any adverse impact on small business.

Reasonable Alternatives to the Proposed Regulations that Would Lessen Any Adverse Impact on Small Business

The State Water Board has determined that the proposed regulations will not have a significant adverse economic impact on business. The purpose of the Orphan Site Cleanup Account (OSCA) is to provide grants to eligible applicants to pay for costs of removing leaking underground storage tanks (UST), and investigating and cleaning up unauthorized releases of petroleum from USTs. In addition to other types of entities, eligible applicants include businesses and small businesses. Thus, the proposed regulations provide financial assistance to eligible applicants, including businesses and small businesses.

Efforts to Avoid Unnecessary Duplication of or Conflicts with Federal Law or Regulations

The proposed regulations do not unnecessarily duplicate or conflict with federal law. The State Water Board does not propose to adopt regulations inconsistent with those contained in the Code of Federal Regulations.

Public Problem Administrative Requirement, or Other Condition or Circumstance that the Proposed Regulations are Intended to Address

Brownfields are abandoned or underused commercial or industrial properties, where the expansion or redevelopment is hindered by contamination. Brownfields vary in size, location, age and past use. Many brownfields in California were former gasoline service stations where leaking USTs containing petroleum products have caused, and in some

cases continue to cause, impacts to soil and groundwater. These properties present public health and environmental impacts, as well as economic challenges, to the communities in which they are located.

In many cases, owners of these brownfield sites and other persons who are responsible for cleaning up the contamination (responsible parties) have abandoned the properties. Even if the owners and other responsible parties can be located, the high cost of remediation is an all-too-common impediment to actual cleanup. As a result, these properties sit idle or underutilized. The risk and cost associated with contamination at these sites discourage potential buyers from acquiring these sites. Thus, without viable responsible parties or purchasers who are willing to undertake UST removal and cleanup, the contamination at these brownfields continues to go unabated and threatens human health, safety and the environment.

The Legislature responded to this problem with AB 1906 (Lowenthal), which appropriates \$10,000,000 per year for 2005, 2006, and 2007, to address petroleum contamination from USTs at brownfields. (See Health and Safety Code section 25299.50.2.)¹ The proposed regulations implement and make specific the program created in AB 1906.

Purpose and Necessity of the Proposed Regulations

The proposed regulations add Article 7 to Chapter 18 of Title 23 of the California Code of Regulations. The proposed regulations are necessary to implement the program created in Health and Safety Code section 25299.50.2. Specifically, the proposed regulations define eligible sites, eligible applicants, and eligible costs and establish eligibility requirements, ranking criteria and funding limitations.

The specific purpose and necessity for each section of the proposed regulations is provided below.

SECTION 2814.20 DEFINITIONS

“Affiliates” - AB 1906 authorizes the use of funds at sites where, among other things, a financially responsible party has not been identified to pay for remediation at the site. To accomplish the goals of AB 1906, the pool of eligible applicants for this grant program should be large. However, the grant funds should not be available to persons who cause or contribute to the contamination at the site. Additionally, the funds should not be available to persons who have certain relationships with the person who caused or contributed to the contamination. The proposed regulation defines “affiliates” and provides a non-exhaustive list of specific relationships that meet the definition of “affiliates.” The definition and the listing are derived from Health and Safety Code section 25299.54, subdivision (h)(5). It is the State Water Board’s position that someone

¹ Unless otherwise indicated, all statutory references are to the California Health and Safety Code.

who is an affiliate of a person who causes or contributes to an unauthorized release should not be able to file an application to the OSCA. Otherwise, an ineligible applicant could have an affiliate file an application to the OSCA, because of their relationship, in an effort to circumvent eligibility requirements.

“Applicant” - This proposed regulation simply clarifies that a person who files an application to the OSCA is an applicant.

“Causes or contributes to an unauthorized release” - As stated earlier, OSCA grant funds should not be available to persons who cause or contribute to the contamination at the site. This includes UST operators and persons who own USTs for a significant period of time without properly permitting, closing or removing the UST. If the UST owner or operator complied with UST regulatory requirements, including permitting requirements, then the UST owners and operators may be eligible for funding from the Petroleum Underground Storage Tank Cleanup Fund (Fund). This regulation specifies circumstances that amount to causing or contributing to an unauthorized release for purposes of the OSCA program.

“Economic activity” - AB 1906 authorizes the use of funds at sites that meet the conditions described in paragraph (2) of subdivision (a) of section 25395.20 of the Health and Safety Code, which defines a “brownfield.” Among other things, to qualify as a brownfield, the property must have previously been the site of an economic activity. Section 25395.20, subdivision (a), paragraph (5) defines economic activity as a governmental activity, a commercial, agricultural, industrial, or not-for-profit enterprise, or other economic or business concern. The proposed regulation tracks the statutory definition of “economic activity.”

“Eligible site” - AB 1906 authorizes the use of funds at sites that meet certain criteria. The site must qualify as a brownfield under Health and Safety Code section 25395.20, subdivision (a)(2). Thus, the site must be located in an urban area, must have been the site of an economic activity that is no longer in operation at that location, and the site must have been vacant or have had no occupant engaged in year-round economically productive activities for a period of not less than 12 months before the date of submitting an application to the OSCA. Also, in accordance with section 25395.20, subdivision (a)(2)(B), a brownfield does not include any of the following: (1) sites listed, or proposed for listing, on the National Priorities List pursuant to section 105(a)(8)(B) of the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. Sec. 9601 et seq.); (2) Sites that are or were owned or operated by a department, agency, or instrumentality of the United States; and (3) Sites that are a contiguous expansion or improvement of an operating industrial or commercial facility, unless the site is a brownfield described in section 25395.20(a)(6)(C). Section 25395.20(a)(6)(C) describes contiguous expansions of operating industrial or commercial facilities that are owned or operated by a small business, certain non-profit corporations, or small business incubators. Therefore, contiguous expansions may qualify as eligible sites if they are owned or operated by one of these three types of entities identified in section 25395.20, subdivision (a)(6)(C).

Assembly Bill 1906 specifically limits the expenditure of these funds to sites where petroleum contamination is the principal source of contamination at the site and the source of the petroleum contamination is, or was, an underground storage tank. The proposed regulation incorporates the substantive requirements from section 25299.50.2 and section 25395.20, which defines an eligible brownfield site.

"Familial relationship" - The proposed regulation tracks the definition in section 25299.54, subdivision (h)(5)(C). As discussed earlier, the proposed regulations prohibit persons who cause or contribute to the unauthorized release, and affiliates thereof, from participating in the OSCA program. Affiliates are persons who have familial relationships, fiduciary relationships, or relationships of direct or indirect control or shared interests. This regulation identifies specific relationships that fall within the meaning of familial relationships.

"Independent Consultant and Contractor" Section 2814.31 of the proposed regulations requires applicants to procure consultant and contractor services from qualified independent contractors and consultants. This proposed regulation describes when a consultant or contractor at a site is independent from an OSCA applicant, responsible party, or prospective buyer. This definition clarifies who applicants may contract with to perform response actions at the site in order to receive payment under the OSCA program.

"Infill Development" Section 2814.27 of the proposed regulations establishes a priority system for OSCA applications. If the State Water Board determines that sufficient funding to meet the demand for OSCA grants will not be available in a given year, the State Water Board will calculate a priority score. One factor to be considered is the potential for the project to result in affordable inner city housing or otherwise promote inner city infill development. This proposed regulation defines infill development and clarifies the circumstances under which an applicant may receive priority points.

"No Longer in Operation" AB 1906 authorizes the use of funds at sites that, among other things, meet the definition of a brownfield under Health and Safety Code section 25395.20, subdivision (a)(2). One criterion to qualify as a brownfield under that section is that the site must have been the site of an economic activity that is no longer in operation at that location. Section 25395.20, subdivision (a)(12) defines the term "no longer in operation" as an economic activity that is, or previously was, located on a property that is not conducting operations on the property of the type usually associated with the economic activity.

"Operation and Maintenance" – Section 25322 of Chapter 6.8 of the Health and Safety Code defines remedy and remedial action and includes site operation and maintenance. (See discussion for "Response Actions" for rationale of using applicable definitions from Chapter 6.8 of the Health and Safety Code.) The proposed regulation essentially tracks the statutory definition of operation and maintenance in Chapter 6.8. It is necessary to

clarify that operation and maintenance activities are part of the remediation process and describe activities that qualify as operation and maintenance.

“OSCA” This proposed regulation is the acronym for the Orphan Site Cleanup Account.

“Performance-based contract” This proposed regulation is derived from Health and Safety Code section 25299.64, subdivision (a)(3). Unlike a time-and-materials based contract, under a performance-based contract, a contractor agrees for a fixed price to perform the response actions to reduce contamination to certain levels.

“Person” – The proposed regulation provides a list of entities that may apply to the OSCA.

“Project” -- Section 2814.27 of the proposed regulations establishes a priority system for OSCA applications. If the State Water Board determines that sufficient funding to meet the demand for OSCA grants will not be available in a given year, the State Water Board will calculate a priority score. One factor to be considered is the potential for the project to result in affordable inner city housing or otherwise promote inner city infill development. This proposed regulation clarifies that the project includes both the response action and the planned future development of the eligible site. The State Water Board believes that the primary objective of the OSCA program is to cleanup unauthorized releases of petroleum at brownfield sites. Another objective is to make productive use of vacant or underutilized sites within urban areas. Cleanup is the first step to the redevelopment process. When considering whether an application should receive “smart growth” priority points, it is appropriate and consistent with the legislative intent to consider the cleanup and potential for revitalization.

“Public agency” - the proposed regulation clarifies which governmental entities are considered public agencies, and therefore eligible to apply to the OSCA.

“Remediation milestone” This proposed regulation is derived from Health and Safety Code section 25299.64, subdivision (a)(4). Section 2814.30 of the proposed regulations requires the applicant to submit certain documentation with their payment request, including, where applicable, a report detailing the attainment of a remediation milestone. This definition of remediation milestone will assist applicants in complying with the requirements of section 2814.30.

“Remedy” or “Remedial Action” - Section 25299.50.2 authorizes the expenditure of funds for the costs of response actions at sites that meet certain criteria. Section 25299.50.2 is contained within Chapter 6.75, Article 6, of the Health and Safety Code, which governs the administration of the Fund. Within chapter 6.75, cleanup activities at petroleum UST sites are consistently referred to as corrective action. Section 25299.50.2, however, refers to “response actions” and incorporates by reference the definition of a brownfield that is contained in Health and Safety Code chapter 6.8, Article 8.5 (Cleanup Loans and Environmental Assistance to Neighborhoods). Article 2 of Chapter 6.8

contains definitions that govern Article 8.5, unless the context requires otherwise. Section 25323.3 of Article 2 of Chapter 6.8 provides that:

“‘Response,’ ‘respond,’ or ‘response action’ have the same meanings as defined in Section 9601(25) of the federal act (42 U.S.C. Sec. 9601(25)). The enforcement and oversight activities of the department and regional board are included within the meaning of ‘response,’ ‘respond,’ or ‘response action.’”

The referenced section, 42 U.S.C. Section 9601, is within the Comprehensive Environmental Response, Compensation and Liability Act or CERCLA. Under 42 U.S.C. section 9601(25), respond or response means remove, removal, remedy, and remedial and include enforcement activities related thereto. Thus, including removal and remedial actions in the definition of response actions is consistent with the legislative intent of AB 1906.

Article 2 of Chapter 6.8 of the Health and Safety Code provides that:

Remedy or remedial action includes all of the following:

- (a) Those actions that are consistent with a permanent remedy that are taken instead of, or in addition to, removal actions in the event of a release or threatened release of a hazardous substance into the environment, as further defined by Section 101(24) of the federal act (42 U.S.C. Sec. 9601(24)), except that any reference in Section 101(24) of the federal act (42 U.S.C. Sec. 9601(24) to the President, relating to determinations regarding the relocation of residents, businesses, and community facilities shall be a reference to the Governor and any other reference to in that section to the President shall, for the purposes of this chapter, be deemed a reference to the Governor, or the director, if designated by the Governor.
- (b) Those actions that are necessary to monitor, assess, and evaluate a release or a threatened release of a hazardous substance.
- (c) Site operation and maintenance. (Health and Safety Code, 25322)

The definition of remedy or remedial action in the proposed regulations incorporates aspects of the definitions contained in Article 2 of Chapter 6.8 of the Health and Safety Code and CERCLA that are applicable to petroleum UST cleanups.

“Remove” or “Removal” – Section 25299.50.2 authorizes the expenditure of funds for the costs of response actions at sites that meet certain criteria. Section 25299.50.2 is contained within Chapter 6.75, Article 6, of the Health and Safety Code, which governs the administration of the Fund. Within chapter 6.75, cleanup activities at petroleum UST sites are consistently referred to as corrective action. Section 25299.50.2, however, refers to “response actions” and incorporates by reference the definition of a brownfield that is contained in Health and Safety Code chapter 6.8, Article 8.5 (Cleanup Loans and Environmental Assistance to Neighborhoods). Article 2 of Chapter 6.8 contains

definitions that govern Article 8.5, unless the context requires otherwise. Section 25323.3 of Article 2 of Chapter 6.8 provides that:

“‘Response,’ ‘respond,’ or ‘response action’ have the same meanings as defined in Section 9601(25) of the federal act (42 U.S.C. Sec. 9601(25)). The enforcement and oversight activities of the department and regional board are included within the meaning of ‘response,’ ‘respond, or ‘response action.’”

The referenced section, 42 U.S.C. Section 9601, is within the Comprehensive Environmental Response, Compensation and Liability Act or CERCLA. Under 42 U.S.C. section 9601(25), respond or response means remove, removal, remedy, and remedial and include enforcement activities related thereto. Thus, including removal and remedial actions in the definition of response actions is consistent with the legislative intent of AB 1906.

Article 2 of Chapter 6.8 provides that:

“Remove” or “removal” includes the cleanup or removal of released hazardous substances from the environment or the taking of other actions as may be necessary to prevent, minimize, or mitigate damage which may otherwise result from a release or threatened release, as further defined by Section 101(23) of the federal act (42 U.S.C. Sec. 9601(23)). (Section 25323.)

The definition of remove and removal in the proposed regulations incorporates aspects of the definitions contained in Article 2 of Chapter 6.8 of the Health and Safety Code and CERCLA that are applicable to petroleum UST cleanups.

“Response Actions” - Section 25299.50.2 authorizes the expenditure of funds for the costs of response actions at sites that meet certain criteria. Section 25299.50.2 is contained within Chapter 6.75, Article 6, of the Health and Safety Code, which governs the administration of the Fund. Within chapter 6.75, cleanup activities at petroleum UST sites are consistently referred to as corrective action. Section 25299.50.2, however, refers to “response actions” and incorporates by reference the definition of a brownfield that is contained in Health and Safety Code chapter 6.8, Article 8.5 (Cleanup Loans and Environmental Assistance to Neighborhoods). Article 2 of Chapter 6.8 contains definitions that govern Article 8.5, unless the context requires otherwise. Section 25323.3 of Article 2 of Chapter 6.8 provides that:

“‘Response,’ ‘respond,’ or ‘response action’ have the same meanings as defined in Section 9601(25) of the federal act (42 U.S.C. Sec. 9601(25)). The enforcement and oversight activities of the department and regional board are included within the meaning of ‘response,’ ‘respond, or ‘response action.’”

The referenced section, 42 U.S.C. Section 9601, is within the Comprehensive Environmental Response, Compensation and Liability Act or CERCLA. Under 42

U.S.C. section 9601(25), respond or response means remove, removal, remedy, and remedial and include enforcement activities related thereto. Thus, including removal and remedial actions in the definition of response actions is consistent with the legislative intent of AB 1906.

The proposed definition of “response action” also includes “corrective action” as defined in section 25299.14.

“‘Corrective action’ includes, but is not limited to, evaluation and investigation of an unauthorized release, initial corrective actions measures, as specified in the federal act, and any actions necessary to investigate and remedy any residual effects remaining after the initial corrective action. Except as provided in the federal act, ‘corrective action’ does not include actions to repair or replace an underground storage tank or its associated equipment.” (Health and Saf. Code, § 25299.14.)

Existing Fund regulations define corrective action as:

“any activity necessary to investigate and analyze the effects of an unauthorized release; propose a cost-effective plan to adequately protect human health, safety, and the environment and to restore or protect current and potential beneficial uses of water; and implement and evaluate the effectiveness of the activity(ies). Corrective action does not include any of the following activities:

- (a) detection, confirmation, or reporting of the unauthorized release; or,
- (b) repair, upgrade, replacement or removal of an underground storage tank or residential tank” (Fund regulations, § 2804)

The term corrective action essentially includes activities to investigate, remediate and monitor the effects of an unauthorized release. These activities are similar to removal actions and remedial actions under Chapter 6.8 of the Health and Safety Code. Since the term corrective action is typically used with petroleum UST cleanups throughout California and the regulated community and regulatory agencies are familiar with the term and what it includes, it is helpful to include that term in the definition of response actions.

The term response actions, which includes removal and remedial actions, under Chapter 6.8 of the Health and Safety Code and CERCLA is more broad than the term corrective action. There is a substantial amount of case law describing and defining removal and remedial actions under CERCLA. Response actions include professional fees and costs that are directly related to removal actions and remedial actions. (*In re: Combustion, Inc.*, 968 F. Supp. 1112 (W.D. La 1996); *Nutrasweet Co. v. X-L Engineering Corp.*, 926 F. Supp. 767 (ND. Ill 1996). Courts have allowed the recovery of professional fees that are closely tied to the actual cleanup, significantly benefit the entire cleanup, and serve a statutory purpose by facilitating a prompt and effective cleanup. (*In re: Combustion, supra.*)

Response costs include costs of supervision by an applicant of response actions (*T&E Industries, Inc. v. Safety Light Corp.* (1988) 680 F. Supp. 696, 707).

Response costs also include costs of UST removal if there is an unauthorized release or a threat of an unauthorized release (*United States v. 150 Acres of Land* (2000) 204 F.3d 698, 710.) Removing the source or a threatened source will mitigate the effects of the unauthorized release and is appropriate and consistent with the goals of the OSCA to include it in the definition of response actions.

There are certain costs that courts have consistently rejected as response actions under CERCLA. These include costs of environmental audits or pre-purchase site investigations, unless performed in response to an unauthorized release or a threatened release. (See *Pennsylvania Urban Development Corporation v. Golen* (1989) 708 F. Supp. 669, *Amland Properties Corp. v. Aluminum Company of America* (1989) 711 F.Supp. 784). This is consistent with the definition of corrective action contained in Chapter 6.75 of the Health and Safety Code and the Fund regulations. Essentially, the corrective action process begins after the unauthorized release has been detected, confirmed or reported. (See Fund regulations, section 2804, definition of corrective action.)

Other costs that have not been considered costs of response actions by courts are economic losses and damages, including but not limited to damages for lost business and diminution in property value (*Artesian Water Company v. New Castle County* (1987) 659 F. Supp. 1269, *Wehner v. Syntex Corporation* (1987) 681 F. Supp. 651.) The funding for the OSCA program is limited and paying for these types of losses and damages would reduce the amount that is available for actual cleanup costs. The goal of the OSCA program is to cleanup the brownfield sites. Limiting OSCA grants to actual cleanup and specific activities that are directly related to cleanup activities serve the overall objective of the OSCA program.

This regulation is necessary because it clarifies which types of costs are eligible for payment under the OSCA program.

“Responsible Party” AB 1906 authorizes the use of funds at sites that meet certain criteria, one of which is that a financially responsible party has not been identified to pay for remediation at the site. It is necessary to clarify under what circumstances a person may be considered a responsible party. The term responsible party is used throughout Chapter 6.7 of the Health and Safety Code to refer to persons who are liable for corrective action at petroleum UST sites. The term is defined in Chapter 16 of Division 3 of Title 23 of the California Code of Regulations (UST Regulations) as follows:

- “(1) Any person who owns or operates an underground storage tank used for the storage of any hazardous substance;
- (2) In the case of any underground storage tank no longer in use, any person who owned or operated the underground storage tank immediately before the discontinuation of its use;
- (3) Any owner of property where an unauthorized release of a hazardous substance from an underground storage tank has occurred; and
- (4) Any person who had or has control over a underground storage tank at the time of or following an unauthorized release of a hazardous substance.” (Cal. Code Regs., tit. 23, ch. 16, §2720.)

Since AB 1906 does not contain a definition of responsible party, it is reasonable to conclude that the Legislature must have intended this long-standing definition of responsible party for purposes of the OSCA program. This regulation is necessary to clarify who will be considered a responsible party for purposes of the OSCA program.

“Small business” The OSCA program is limited to sites that among other things, qualify as brownfields under section 25395.20. Excluded from the definition of brownfields is a site that is a contiguous expansion or improvement of an operating industrial or commercial facility, unless certain specified criteria are met. Sites of contiguous expansions are eligible under section 25395.20(a)(6)(C) if the site is owned or operated by a small business, certain non-profit corporations, or small business incubators. Therefore, contiguous expansions may qualify as eligible sites if the site is owned or operated by one of these three types of entities identified in section 25395.20, subdivision (a)(6)(C).

Chapter 6.8 defines small business, and the proposed regulation tracks this definition. To qualify as a small business, among other things, the business, together with its affiliates, must have 100 or fewer employees. The California Department of General Services (DGS), Office of Small Business Procurement and Contracts certifies small businesses. The “small business” definition contained in Chapter 6.8 is apparently based in part upon the definition used by the DGS. (See Title 2 of the California Code of Regulations, Chapter 3, section 1896.12, subdivision (a).) To qualify as a small business under these DGS regulations, among other things, the business, together with its affiliates, must have 100 or fewer employees. (Cal Code of Regs., tit. 2, section 1896.12, subdivision (a)(5)(A).) Section 1896.12 also establishes factors to be considered by the DGS when determining if two or more businesses are related. (See section 1896.12, subdivision (d)(7).) It is appropriate to use this definition of “affiliates” for purposes of defining a small business. Since section 25299.50.2 incorporates the definition of brownfield (and therefore the definition of small business) from Chapter 6.8, using the DGS definition is most consistent with the legislative intent. This regulation is necessary because it clarifies the definition of small business.

“Urban area” AB 1906 authorizes the use of funds at sites that meet the conditions described in paragraph (2) of subdivision (a) of section 25395.20 of the Health and Safety Code, which defines a “brownfield.” Among other things, to qualify as a brownfield, the property must be located in an urban area. Chapter 6.8 defines an urban area as either of the following:

“(A) The central portion of a city or a group of contiguous cities with a population of 50,000 or more, together with adjacent densely populated areas having a population density of at least 1,000 persons per square mile.

“(B) An urbanized area as defined in paragraph (2) of subdivision (b) of Section 21080.7 of the Public Resources Code.” (Health & Saf. Code, § 25395.20, subd. (a)(19).)

Public Resources Code section 21080.7 was repealed in 2002, by Senate Bill 1925 and was not in effect when AB 1906 was enacted. For purposes of implementing AB 1906, the State Water Board is using the definition of “urban area” in subparagraph (A) only.

The first step in applying this proposed regulation is to determine if the site is located in a city or a group of contiguous cities that have a population of 50,000 or more. The statute limits urban areas to cities, so the site must be located in an incorporated area. If the city alone does not meet the population requirement, then it is appropriate to look at contiguous cities to determine if, as a group, the population requirement is met. If the population requirement is not met in a city or the group of contiguous cities, the population of the area adjacent to the city can be considered so long as the area has a population density of least 1,000 persons per square mile. Even though adjacent, densely populated areas may be used to meet the population requirement, the site must be located in an incorporated area.

If a city or group of cities meet the population requirement, then it must be determined if the site is located in the central portion of the city or group of contiguous cities. The word “center” has many meanings, including a point, area, person or thing that is most important or pivotal in relation to an indicated activity, interest, or condition or a region of concentrated population. (Merriam Webster’s Collegiate Dictionary, Tenth Edition.) The State Water Board believes that it has a reasonable amount of latitude in determining what constitutes the central portion of a city.

SECTION 2814.21. OTHER DEFINITIONS

This regulation provides that if a term is used in this new article, but is not defined, then the definition of the term (if any) contained in section 2804 of Article 2 of Chapter 18 shall apply. There is an exception to this rule, however. If the term in this article is used in a context that requires some other interpretation than the definition contained in Article 2, then the Article 2 definition shall not apply. This is a standard provision that assists with interpreting regulations.

SECTION 2814.22. TYPES OF GRANTS

Assembly Bill 1906 authorizes the expenditure of funds for the costs of response actions at sites that meet certain criteria. In general terms, response actions include activities necessary to investigate and evaluate the effects of an unauthorized release, develop a plan for actual remediation, implement the remediation plan, monitor the effectiveness of the remediation plan implementation, and any activities throughout the process that are necessary to remove the effects of the unauthorized release or mitigate the impacts of the unauthorized release. Response actions include activities that are described as corrective action in Chapter 6.7 and Chapter 16 of Title 23 of the California Code of Regulations. Since the term corrective action is typically used with respect to petroleum UST cleanups throughout California and the regulated community and regulatory agencies are familiar with the term and what it includes, it is helpful to refer to corrective action and the

various phases of the corrective action process when describing the two grants available under OSCA.

UST cleanups are typically performed in two basic phases – the assessment phase and the actual cleanup and monitoring phase. Applicants may request either or both types of grants, depending upon their particular cleanup project. The OSCA may only pay for eligible costs that were incurred on or after January 1, 2005. Some applicants may have already completed the assessment phase by January 1, 2005, and are looking for financial assistance for the cleanup phase of the project. The proposed regulation specifies that an applicant may apply for both an assessment grant and a cleanup grant on a single application.

OSCA funds are limited (\$10 million dollars per year for three years) and the time within which the State Water Board must disburse the funds is limited. The State Water Board must manage the OSCA funds efficiently to ensure that the funds are used effectively and not tied up by projects that are not moving ahead in a timely manner. This proposed regulation provides that an applicant may apply for a cleanup grant before a corrective action plan is complete and approved, but may not be **awarded** the grant until the corrective action plan is completed and approved by the appropriate regulatory agency. When the State Water Board “awards” a grant to an applicant, the State Water Board essentially commits the grant amount to the applicant so that the applicant has some assurance that the funds will be available to perform response actions. Committing funds to one applicant depletes the amount that can be committed to another applicant. Thus, before committing cleanup grant funds, the applicant needs to demonstrate that the first phase of the remediation process (i.e., assessment) is complete. Otherwise, funds could be committed to an applicant, to the detriment of other worthy applicants. The OSCA program should not be administered in a manner that unnecessarily ties up funds at the expense of other worthy cleanup projects that are ready to progress.

To summarize, the phased approach for the grants allows the State Water Board to manage the limited OSCA funds in an efficient manner.

SECTION 2814.23. ELIGIBLE APPLICANTS

AB 1906 authorizes the use of funds at sites where, among other things, a financially responsible party has not been identified to pay for remediation at the site. To accomplish the goals of AB 1906, the pool of eligible applicants for the OSCA program should be large. However, the OSCA program should not be available to persons who caused or contributed to the unauthorized release in a significant way. The proposed regulations strike a balance between these two competing policy goals. Any person who has caused or contributed to the unauthorized release at the site, or any affiliate thereof, may not participate in the program. If a person operated the subject UST or owned the leaking UST for an unreasonable period of time before properly permitting, closing or removing the UST, that person is considered to have caused or contributed to the unauthorized release. (The proposed regulations provide an exception, however, where the UST owner was unaware of the hidden USTs despite reasonable diligence.) The

State Water Board expects that persons who are interested in cleaning up a brownfield site using OSCA funds will purchase the site, including fixtures (e.g., UST). In those cases, the person will become the owner of the UST. However, if the person closes, removes or properly permits the UST within a reasonable period of time after becoming the owner, the person will not be deemed to have caused or contributed to the unauthorized release. This gives an applicant a reasonable amount of time, after becoming the UST owner, to comply with UST regulatory requirements and not jeopardize its status as an eligible applicant.

The State Water Board believes that it is appropriate to exclude persons from this program if they are affiliates, as defined, with a person who caused or contributed to the unauthorized release, as defined. Otherwise, an ineligible person (e.g., owned the USTs and the real property for 20 years) could simply have a business partner or a family member apply to the OSCA program. The State Water Board believes that the OSCA program was designed to encourage cleanup at brownfield sites without conferring a significant benefit on persons who caused or contributed to the problem.

The proposed regulations also exclude persons who are eligible to receive reimbursement for corrective action costs from the Fund. The OSCA program is very limited in financial resources and duration. As indicated earlier, the OSCA program receives \$10 million per year for three years. If an applicant qualifies for the Fund, which is not similarly limited, the applicant should utilize the Fund for financing the cleanup. This is an efficient way to manage the limited amount of money dedicated to the OSCA program.

With brownfield sites, the goals are to cleanup the site and start the revitalization process. Redevelopment projects may be impeded if potential OSCA applicants must wait many years to receive financial assistance for cleanup expenses from the Fund. The State Water Board believes that the benefit of expediting cleanup and redevelopment at these brownfield sites outweighs the potential burden on the limited OSCA funds and that the proposed regulation strikes a good balance between these competing objectives.

SECTION 2814.24 ELIGIBILITY REQUIREMENTS

AB 1906 allows expenditure of funds at sites where, among other things, a financially responsible party has not been identified.

Subdivision (a) limits the financial viability test to responsible parties other than the applicant. The term responsible party is broad and includes UST owners and property owners. Thus, there may be eligible applicants to the OSCA program that technically fall into the definition of a responsible party (e.g., a short-term owner of a UST or a person who owns real property but never operated the USTs.) If the otherwise eligible applicant is willing and able to cleanup the property, and in the process becomes a responsible party, the applicant's ability to pay for the cleanup should not be an obstacle to obtain OSCA funds. The State Water Board expects private developers, non-profit groups and redevelopment agencies to apply for these funds, and requiring these types of groups to show that they are without financial resources to conduct the cleanup would defeat the

purpose of the OSCA program. The State Water Board believes that there are four general factors that should be considered when determining if a party who is responsible for the unauthorized release, other than the applicant, is financially able to pay for response actions to remediate the harm caused by the unauthorized release.

(a)(1) - The first factor is the estimated cost of the response actions. The State Water Board recognizes that applicants will be submitting applications where the applicant may have little data about the unauthorized release. Therefore, it may be difficult or even impossible for the applicant to provide a reasonable cost estimate for the expected response actions. The State Water Board, having implemented the Fund for 14 years, has the experience of processing thousands of claims with petroleum UST releases and will usually be able to assist applicants in developing a reasonable cost estimate based upon information that is available to the applicant. This proposed regulation allows the State Water Board to provide this assistance if the applicant is unable to provide a reasonable estimate.

(a)(2) -- The second factor that will be assessed is the responsible party's income and assets. To implement the legislative directive of only spending OSCA funds where there is no financially responsible party, it is necessary to consider the responsible party's income and assets.

(a)(3) -- The third factor that will be evaluated is whether the responsible party has received or will receive insurance coverage that may provide financial assistance to the responsible party to conduct remediation, which impacts the responsible party's overall ability to pay for cleanup at the site. Thus, any insurance coverage will be evaluated when considering if the responsible party can pay for cleanup at a site. If the applicant or responsible party reports potential insurance coverage, but claims that coverage is denied or disputed by the insurance carrier, the State Water Board will consider those arguments as well.

(a)(4) -- The fourth factor that will be evaluated is whether the responsible party has received financial assistance from other sources such as programs that provide financial assistance to cleanup brownfield sites. One such program is administered by the United States Environmental Protection Agency. There may be other programs sponsored by local agencies or redevelopment agencies. The State Water Board believes that it is appropriate to consider any of these types of funds that the responsible party has received or may receive when determining whether the responsible party is financially able to pay for remediation at the site.

Subdivision (b)-- This subdivision pertains to applications that are filed by two or more joint applicants. As explained above, if an otherwise eligible applicant is willing and able to cleanup the property, and in the process becomes a responsible party, the applicant's ability to pay for the cleanup should not be an impediment to receiving OSCA funds. However, this general rule (not considering the applicant's ability to pay for response actions) should not be used to circumvent statutory conditions imposed by the Legislature (i.e., expenditure of funds at sites where a financially responsible party has not been

identified.) This regulation is necessary to preclude financially responsible parties from banding together as applicants to circumvent this statutory limitation. The State Water Board recognizes that there may be cases where multiple responsible parties file as joint applicants and it is not appropriate to consider the financial resources of the non-primary joint applicants. The regulation specifies that the joint applicants have the burden of demonstrating to the State Water Board that considering their financial ability to perform response actions would be unreasonable or inequitable under the facts and circumstances surrounding the application.

(c) – AB 1906 authorizes the expenditure of funds at sites where, among other things, a financially responsible party has not been identified. The State Water Board recognizes, however, that it may be difficult for applicants to locate responsible parties, and even if they are located, it may be difficult to demonstrate that the responsible party is not financially able to pay for remediation. The State Water Board further recognizes that in many cases financial information is confidential and cannot generally be accessed without the cooperation of the responsible party. Therefore, the proposed regulations require the applicant to make reasonable efforts to obtain the specified information from the responsible party. The State Water Board is also mindful of the fact that financial information or a company's financial status may be available through reporting systems such as Dunn and Bradstreet, and expects applicants to utilize these types of tools where appropriate.

SECTION 2814.25 – GRANT CONDITIONS AND LIMITATIONS

Subdivision (a) -- AB 1906 authorizes the expenditure of funds for response actions at sites that meet certain criteria. Among other things, petroleum must be the principal source of contamination, and it must have originated from a petroleum UST. The funds in the OSCA are limited (\$10,000,000) per year, for three years. This regulation limits the reimbursement of response action costs to those that are both reasonable and necessary. Given the limited funds and the desire to cleanup as many brownfields as possible, it is appropriate and consistent with the legislative intent to limit reimburse costs to those that are both reasonable and necessary.

(a)(1) - AB 1906 became effective on January 1, 2005, and the State Water Board believes it is appropriate to reimburse eligible costs that were incurred on and after that date.

(a)(2) – When a regulatory agency confirms an unauthorized release from a petroleum UST and requires further action, the regulatory agency will issue a cleanup directive. Local agencies typically issue these orders under Health and Safety Code section 25296.10. Regional Water Quality Control Boards may direct cleanups under either that section of the Health and Safety Code or Division 7 of the California Water Code. This proposed regulation requires that the regulatory agency direct cleanup and it is sufficiently broad to include directives issued under the Health and Safety Code or the Water Code.

(a)(3) -- The proposed regulations also limit reimbursement to situations where the underlying response actions are necessary to protect human health, safety and the environment, and are performed in accordance with applicable provisions of the Health and Safety Code or the Water Code. This regulation is to ensure that OSCA funds are only used for actions that are necessary to protect human health, safety and the environment. The State Water Board recognizes that many of the sites that are accepted into the program have plans for redevelopment. There may be certain activities and corresponding costs that are necessary for redevelopment, but that are not necessary to protect human health, safety and the environment. This regulation is necessary to clarify that OSCA funds may only be used to pay for response actions that are necessary for the protection of human health, safety and the environment.

(a)(4) -- In 2002, the Legislature enacted Assembly Bill 1218, which specifically authorizes the use of performance-based contracts at Fund sites. Unlike a time and materials contract, performance-based contracts provide for payments to contractors based upon the completion of certain milestones. Performance-based contracts are used for the implementation of the corrective action plan. The site must be thoroughly investigated before the terms of a performance-based contract can be negotiated. It has been the State Water Board's experience that cleanup progresses in a more-timely manner under performance-based contracts than under time and materials contracts. Since the duration of the OSCA program is relatively short, the State Water Board believes that expedited cleanups serve the legislative purpose of cleaning up brownfield sites and facilitating the revitalization process.

Performance-based contracts are effective when groundwater has been contaminated. Therefore, the proposed regulation requires a performance-based contract for corrective action plan implementation where groundwater has been impacted. The proposed regulation also provides an exception to this requirement if utilizing a performance-based contract is unreasonable or impossible under the facts and circumstances of a particular application. The State Water Board recognizes that some public agencies may have very specific procurement, bidding, and contracting requirements. It may be legally impossible for these types of applicants to enter into a performance-based contract. Also, depending upon the geographic area of the state, it may be difficult to locate contractors and consultants who are willing to enter into a performance-based contract for the eligible site. The proposed regulation places the burden on the applicant to demonstrate how using a performance-based contract would be impossible or unreasonable.

(b)(1) -- To receive an assessment grant, the applicant is not required to own the eligible site. This allows applicants to assess the site and evaluate their risks before becoming the real property owner and responsible party. Applicants are required, however, to submit all site assessments and investigation reports, workplans and corrective action plans that are available to the applicant. Both the State Water board and the regulatory agency must be made aware of the efforts that have already occurred at the site. This information will be used by the State Water Board to negotiate grant agreements. The OSCA program should not pay for response actions that have already been done at the site. Unless the

previous response work completed at the site is deficient, the OSCA program should not pay for duplicative work.

Additionally, after assessing the site, an applicant may decide not to acquire the site and proceed with cleanup activities. Even though the applicant who assessed the site and obtained OSCA funding for assessment activities does not intend to proceed with the cleanup phase, it is important that any and all site assessments, investigation reports, workplans and corrective action plans that are reasonably available to the applicant be made available to any other persons who may be interested in completing response actions at the site. The best way to ensure that these persons have access to the site information is to make it available at the regulatory agency and the State Water Board. This regulation requires OSCA applicants to submit these reports to the State Water Board and the applicable regulatory agency as a condition of receiving funding.

(b)(2) -- This regulation requires that an applicant be the equitable or legal owner of the eligible site before the applicant may receive payment under a cleanup grant. This requirement does not apply to public agencies. If an applicant receives OSCA funds to cleanup the site, the applicant should have to demonstrate that it has a substantial stake in the property (equitable or legal ownership). The regulation requires that the applicant obtain either legal ownership or equitable ownership before the applicant receives payment under a cleanup grant. When parties enter into a purchase and sale agreement (sales agreement) of real property, the buyer becomes the equitable owner of the property after the sales agreement is fully executed. An escrow is typically established and the parties frequently address environmental problems during the escrow process. There are risks involved when purchasing contaminated properties – after the purchaser becomes the legal owner of the property, the purchaser becomes a responsible party. If the regulations required legal ownership of the site before cleanup funds could be received, then some parties (potential applicants) may not be willing to take the risk of pursuing cleanup. Allowing the payment of cleanup funds to equitable owners provides more flexibility and options to the purchaser and seller and should promote the cleanup of brownfield sites.

(c) – this regulation establishes a monetary cap of \$1.5 million per occurrence. The term “occurrence” is defined in section 2804 of the Fund regulations. This is the cap that applies to claims submitted to the Fund. The cost of remediating a typical petroleum UST contaminated site rarely exceeds \$1.5 million, so this limit should give applicants assurance that sufficient funding will be available to cleanup the site.

(d) – This regulation limits the amount that may be awarded to an applicant and affiliates of applicants in any fiscal year. The limit is \$3 million per fiscal year. The OSCA program is very limited in funding (\$10 million per year for three years). The purpose of this limitation is to award numerous different applicants (or groups of applicants) in any given fiscal year. The proposed regulation allows the State Water Board to waive this limitation if doing so would provide for an equitable and timely use of funds. The waiver will need to be considered and applied on a case-by-case basis.

SECTION 2814.26 – DOUBLE PAYMENT

Subdivision (a) --The proposed regulation prohibits an applicant from receiving a double payment on account of any cost of response action. Rather than repeating Fund regulation section 2812.3, the OSCA regulations incorporate that section by reference. Section 2812.3 uses terms applicable to Article 4 of Chapter 18. This proposed regulation replaces those terms with terms that apply under OSCA, such as applicant, OSCA, and response actions.

An applicant receives a double payment when it receives a payment or other consideration for the same costs from both the OSCA and another source. For example, this issue could arise if the applicant initiates litigation against a potentially responsible party over contamination resulting from an unauthorized release from a petroleum UST and the parties subsequently settle the litigation. The OSCA is intended to provide financial assistance to cleanup brownfield sites so that the sites can be used for productive purposes. Allowing applicants to receive duplicative compensation for the same costs would create a significant windfall for applicants. If an applicant is receiving money for response actions from some other source, the OSCA funds should be preserved for other worthy applicants who, without the assistance of OSCA, may not be able to complete the cleanup.

The proposed OSCA regulations differ from the Fund regulations section 2812.3 in that a reduction in the cost to acquire an interest in real property will not be considered compensation from another source for purposes of the OSCA program. The State Water Board believes that treating any purchase-price reduction as a potential double payment would create another impediment to cleaning up and redeveloping brownfield sites.

Since the State Water Board will follow the same basic procedure set forth in section 2812.3 of the Fund regulations when evaluating potential double payments under the OSCA program, section 2812.3 is fully explained below.

Section 2812.3 of the Fund regulations establishes State Water Board procedures for determining whether a claimant that has received compensation (such as a settlement payment) from other sources has received a double payment. (Since settlement agreements are the most common vehicle by which applicants receive compensation from another source, settlement agreements will be used to illustrate how the State Water Board will evaluate double-payment issues.) Absent an express allocation of settlement monies in the settlement agreement, the State Water Board bases its determination regarding the purposes of the compensation on the terms of the settlement agreement or underlying complaint. Even when the evidence supports a finding that all or a portion of the settlement monies are for corrective action or other Fund-reimbursable costs, the State Water Board reviews the claimant's documentation of actual ascertainable and non-reimbursable costs to which the settlement payment reasonably may be attributed in order to reduce (or offset) the amount of money that is determined to be a potential double payment. Typically, the State Water Board does not allow an offset for the

claimant's attorneys' fees paid to resolve the litigation unless the applicant could have recovered attorneys' fees in the underlying litigation. Attorneys' fees are not generally recoverable absent statutory authorization.

Based upon Health and Safety Code section 25299.54, subdivision (g), the Fund regulations clarify the circumstances when an insurance company may incur costs on behalf of a claimant or advance costs to a claimant without violating the double payment prohibition. The Fund regulations grandfather those claims that had a letter of commitment before June 30, 1999, provided the claimant is required to reimburse the insurer for any costs the insurer paid while awaiting reimbursement from the Fund. For claims after June 30, 1999, the State Water Board must analyze the insurance contract to ensure that the contract (1) explicitly coordinates benefits with the Fund, (2) requires the applicant to maintain eligibility with the Fund, and (3) requires the applicant to reimburse the insurer for costs paid by the insurer while awaiting reimbursement from the Fund.

When a claimant obtains a settlement or judgment for eligible costs, another party has paid costs that the Fund would otherwise reimburse. Drawing on the common law common fund doctrine, the State Water Board has determined in precedential State Water Board Orders WQ 96-04-UST and WQ 98-05-UST that it is equitable to recognize the benefit that a claimant has obtained for the Fund when the claimant recovers money for costs that the Fund would otherwise reimburse. The amount that the State Water Board has determined to be a potential double payment under section 2812.3, subdivision (c) represents the benefit to the Fund.

Subdivision (f) of section 2812.3 of the Fund regulations establishes procedures for the Fund to bear a fair share of the claimant's costs of obtaining a settlement payment or judgment for eligible corrective action costs. The State Water Board first must calculate the Fund's fair share of the claimant's costs to obtain the settlement proceeds or judgment. The Fund's fair share shall be equal to the lesser of either (1) the claimant's actual legal costs to obtain the settlement proceeds or judgment in proportion to the ratio of the costs the Fund would otherwise have reimbursed to the total settlement or judgment amount, or (2) 30 percent of the benefit to the Fund.

In those instances when the actual legal fees and costs determine the Fund's fair share (see (1) in the preceding paragraph), the State Water Board has determined that it is appropriate to fix the Fund's share based on the ratio of the Fund's benefit to the claimant's total recovery. A claimant's settlement may include both costs the Fund would have paid and other damages (such as lost profits); however, the invoices for the attorneys' fees and costs would not clearly distinguish between attorneys' fees that reduced the Fund's reimbursement and attorneys' fees that were incurred solely to the claimant's benefit. As a result, the regulation determines the Fund's fair share to be the actual, total attorneys' fees and costs reduced in proportion to the ratio of the costs the Fund would otherwise have reimbursed to the total settlement or judgment amount. For example, if the benefit to the Fund represented 40 percent of the claimant's total recovery, the Fund would pay 40 percent of the attorneys' fees and legal costs.

In the remaining fair-share cases, the State Water Board chose 30 percent as an appropriate contribution based on an analysis of the above-mentioned orders. In addition, 30 percent is a percentage commonly used by the courts in common fund cases.

The State Water Board will then deduct the fair share amount from the amount the State Water Board has determined to be a potential double payment. This is advantageous to the claimant because the amount that the Fund staff considers to be a double payment is reduced and the amount that the claimant can receive from the Fund is increased. The proposed regulation incorporates the procedures established in the above-mentioned State Water Board orders.

In addition, Fund regulations, section 2812.3, subdivision (f) prohibits the Fund from bearing a fair share of the costs if the person paying the monies to the claimant is eligible to file a claim against the Fund and has not waived its ability to file a claim. In this situation, the paying party may file a claim against the Fund for the monies it has paid to the original claimant. Accordingly, there is no benefit to the Fund because the Fund must reimburse the paying party's eligible costs.

Finally, subdivision (f) prohibits the Fund from bearing a fair share if the claimant has already been wholly compensated for its costs. Otherwise, the claimant would receive a windfall if it has already been compensated for all of its costs and then receives a common fund contribution from the Fund.

SECTION 2814.27 PRIORITY RANKING

This regulation establishes a priority system for ranking eligible OSCA applications. The applications will be ranked on a first-come, first-served basis, unless there are insufficient funds to meet demands on the OSCA program, as discussed in more detail below. The OSCA applications that were received by the State Water Board within forty-five (45) days of the November 28, 2005, effective date of the emergency regulations, which is January 12, 2006, were randomly ranked to determine priority. All applications that are received after January 12, 2006, will be ranked in accordance with the date that they are received. If more than one application is received on the same date, the applications will be randomly ranked to determine the priority.

If the State Water Board determines that sufficient funding to satisfy the demand for OSCA grants will not be available in a given fiscal year, the State Water Board will transition to a ranking system that prioritizes applications based upon three factors. Given the short lifespan of this program, the State Water Board wants to encourage applicants to submit timely applications and therefore rank applications based upon the date that the application is received. However, if the limited funding is not sufficient, the State Water Board believes that the funding should first go to the cleanup projects that meet other worthy objectives that are consistent with the redevelopment of brownfield sites.

If this priority system is triggered, the proposed regulations require the State Water Board to rank the applications based upon the following factors: (1) water quality concerns – 40%; (2) income level of applicable census tract – 30%; and (3) smart growth potential of proposed project – 30%.

Assembly Bill 1906 authorizes the use of these funds for response actions at contaminated sites and charged the State Water Board with implementing this program. It is the State Water Board's position that the water quality factor should be afforded the most weight when ranking eligible applications. Therefore, if the unauthorized release that is the subject of the OSCA application is located within 1,000 feet of a drinking water well or a surface water body used as a source of drinking water, then the application will receive 40 of the possible 100 priority points.

The second factor relates to the income level in the census tract in which the eligible site is located. The proposed regulation provides for 30 priority points if the eligible site is located in a census tract with median household income (MHI) of less 80% of the statewide MHI based on the most recent census data collected by the United States Census of the Bureau.

Census tracts are small, relatively permanent statistical subdivisions of a county. During the emergency rulemaking process, the State Water Board received comments about comparing the census tract MHI to the statewide MHI. The commenter argued that this formula would knock out most low-income neighborhoods in larger metropolitan areas (San Francisco for example), because the "community" MHIs are higher compared to the state, but still relatively low when compared to the county. The commenter suggested comparing the census tract MHI to the MHI for the county in which the site was located.

The State Water Board rejected this alternative for the following reasons. Projects in high-income counties may receive these priority points even though the MHI for the census tract in which the site is located is much higher than the statewide MHI. For example, the MHI for Santa Clara County (all figures based on 2000 Census) is \$74,335. So a project in a census tract in Santa Clara County with a MHI as high as \$59,467 would receive these priority points using the alternative proposed, even though the MHI for all of California is only \$47,493. Eighty percent of the statewide MHI is \$37,994. In addition, the proposed alternative would present a disadvantage to counties where the countywide MHI is already low. A site census tract in a low-income county would have to have even a lower MHI than 80% of the statewide MHI.

Since this is a statewide program, the State Water Board believes that it is more appropriate to compare the census tract MHI to the **statewide** MHI.

The third factor incorporates smart growth principles in that the application will receive 30 priority points if there is potential for the project (cleanup and planned future development) to result in development of affordable inner city housing or otherwise promote inner city infill development. The State Water Board believes that awarding priority points for inner city projects is consistent with objectives of AB 1906.

SECTION 2814.28 – OSCA APPLICATION REQUIREMENTS

The proposed regulation specifies the information and certifications that the applicant must submit in order for the State Water Board to determine the if all eligibility requirements for OSCA are met and the priority ranking of the application.

Subdivision (a) requires an applicant to submit standard information about the applicant. The State Water Board must know the entity type because certain rules apply to private entities that do not necessarily apply to public agencies. The State Water Board needs basic contact information so that correspondence and other communications can be exchanged when processing the application. Since the State Water Board may be disbursing funds to the applicant that are reportable to taxing authorities, the State Water Board requires tax identification numbers or social security numbers, depending on the entity type of the applicant.

Subdivision (b) requires the same information as subdivision (a) for any joint applicants identified on the application.

Subdivisions (c) through (f) require the submission of information relating to the site and the contamination that are the subject of the application. AB 1906 and the proposed regulations authorize expenditure of funds at sites where, among other things: (1) petroleum is the principal source of contamination at the site; and (2) The source of petroleum contamination is, or was, a UST. The information required in subdivisions (c) through (f) will enable the State Water Board to determine if the requirements stated above are met.

A site map, depicting the location of the UST and any other sources of contamination at the site and a listing of other known or potential sources of contamination will assist the State Water Board in deciding if the contamination originated from a petroleum UST at the site or an adjacent site that may also be a source of contamination. It is necessary to know when the UST at the eligible site was removed to determine if it is/was the source of the contamination. For example, if the UST was removed 40 years ago, yet the petroleum contamination has characteristics of a more-recent release, there may be issues of whether the petroleum contamination is from the former UST or some other source.

Subdivision (g) -- The proposed regulations impose several eligibility conditions for receiving grant funds from the OSCA. For example, the regulatory agency responsible for overseeing response actions must direct cleanup at the site and the response actions must be necessary to protect human health, safety and the environment. (See proposed regulations, section 2814.25. subdivisions (a)(2) and (a)(3).) Subdivisions (g) through (i) of this proposed section require the applicant to submit basic contact information about the regulatory agency that is overseeing response actions at the site so that State Water Board staff may contact the regulatory agency regarding the contamination at the site. Subdivisions (h) and (i) require the applicant to submit information about the unauthorized release and response actions at the site so that the State Water Board may

evaluate the eligibility of the site and response action costs. Subdivision (h) specifically requires the applicant to describe whether the unauthorized release has impacted groundwater. This information is necessary so that the State Water Board can determine if the applicant must comply with proposed regulation section 2814.25, subdivision (a)(4) – performance-based contracts for response actions that carry out cleanup activities as described in section 2814.22 of the proposed regulations.

Subdivision (j) – this proposed regulation requires the applicant to provide explanations and submit information that demonstrates that the site that is the subject of the application meets the definition of an “eligible site” contained in proposed section 2814.20.

Subdivision (k) – this proposed regulation requires the applicant to submit explanations and information that demonstrate that the applicant meets the requirements of proposed section 2814.23 (eligible applicant).

Subdivision (l) – this proposed regulation requires the applicant to submit information indicating whether a financially responsible party has been identified, other than the applicant if the applicant also happens to be a responsible party, to pay for response actions at the site.

Subdivision (m) – this proposed regulation requires the applicant to submit information that will allow the State Water Board to determine the priority ranking of an application in the event that the priority system described in proposed regulation section 2814.27, subdivision (b) is triggered.

Subdivision (n) -- this proposed subdivision requires the applicant to certify that costs for response actions for which the applicant will be seeking payment were incurred on or after January 1, 2005. The proposed regulations limit payment to eligible costs of response actions incurred on or after January 1, 2005. Applicants will not typically submit invoices for response action costs, which show when the costs were incurred, until later in the application process. Thus, to evaluate eligibility at the application stage, the applicant will need to declare whether or not the costs were incurred on or after January 1, 2005.

Subdivision (o) – this proposed regulation requires the applicant to certify that all applicable eligibility requirements are satisfied.

Subdivision (p) – this proposed regulation requires the applicant to submit a copy of any agreement where a person agrees to incur costs on behalf of an applicant. It is necessary for the State Water Board to review the actual agreement to ensure that the person incurring the costs is actually incurring them on behalf of the applicant and not on the person’s own behalf. Further, review of the actual document is necessary to ensure that the applicant is not receiving an inappropriate double payment.

Subdivision (q) – this proposed regulation requires the applicant to submit any information or documentation that is reasonably required by the State Water Board to

determine the eligibility or priority of the application or the amount that may be paid under an OSCA grant. This catchall is necessary because sites are unique and circumstances surrounding the sites, responsible parties, applicants, and response actions vary. The State Water Board must make certain findings before making funding determinations, and this regulation gives the State Water Board reasonable latitude when requesting information that will allow it to make certain findings.

SECTION 2814.29 – PRIORITY LIST

If an application is eligible for the OSCA program, the application will be placed on the priority list. This proposed regulation describes the State Water Board's process for compiling and maintaining the priority list. The State Water Board will update and adopt the priority list at least once a year with eligible applications (subdivision (b).) The State Water Board requires a certain amount of time to review an application and determine if the application may be placed on the priority list. Thus, subdivision (b) provides that the State Water Board place on a revised priority list only those eligible applications received at least 30 days before adoption of the priority list.

After an eligible applicant and the State Water Board enter into a grant agreement, the application will be removed from the priority list. Thus, subdivision (c) provides that applications where a grant exists between the State Water Board and applicant will not be incorporated into revised priority lists.

Subdivision (d) provides that when the State Water Board revises the priority list by adding eligible applications, the new applications will be ranked below the applications that were on the priority list before the revision. This is consistent with the first come, first served priority-ranking system.

SECTION 2814.30 – GENERAL PROCEDURES FOR PAYMENT

This proposed regulation describes the procedure for making payments pursuant to an OSCA grant. This regulation provides that after the State Water Board determines that an application is eligible, the applicant and the State Water Board shall enter into a grant agreement. (Subdivision (a).) Subdivision (a)(1) specifies information that the applicant must provide when entering into grant agreements with the State Water Board. In particular, for assessment grants and cleanup grants, where the underlying work is not performed pursuant to a performance-based contract, the applicant must provide a proposed scope of work and a budget. For cleanup grants where the response actions are not conducted pursuant to a performance-based contract, the applicant must also submit three responsive proposal or bids in accordance with section 2814.31 of the proposed regulations. The submission of these documents is necessary so that the State Water Board may enter into a grant agreement with the applicant that uses OSCA funds to pay for reasonable and necessary costs of response actions.

Subdivision (a)(2) relates to response actions that are performed under a performance-based contract. Subdivision (a)(2) requires applicants to submit at least three responsive

proposals or bids in accordance with section 25299.65 of the Health and Safety Code. Health and Safety Code section 25299.65 establishes a bidding process for performance-based contracts and requires the submission of multiple bids. This proposed regulation specifies that the applicant must submit three bids or proposals under the OSCA program.

Subdivision (b) provides that the applicant may begin submitting payment requests after the grant agreement is executed by the State Water Board and the applicant. The grant agreement commits a certain amount of funds to the applicant. As the remediation progresses and the applicant incurs response action costs, the applicant can request reimbursement for its eligible costs. To manage and control the number of payment requests, applicants may only submit requests that are \$5,000 or more. It is not the State Water Board's intent to apply this limitation to a final payment request.

Subdivision (c) specifies information that the applicant must submit along with a request for payment. Subdivision (c) applies to payment requests for assessment funds or cleanup funds, where the response actions are not conducted pursuant to a performance-based contract. Basically, these are response actions that are conducted pursuant to a traditional time-and-materials contract. The State Water Board must obtain and review certain, standard information to ensure that OSCA funds are only used for costs of eligible response actions that are both reasonable and necessary. The list of information contained in subdivision (c) is necessary for the State Water Board to perform this review.

Subdivision (d) governs payment requests for cleanup funds where the response actions are performed in accordance with a performance-based contract. With performance-based contracts, the applicant agrees to pay its consultant or contractor on a performance basis. For example, the applicant may be required to pay the contractor a certain amount of the total contract price when 25% of the remediation target or milestone is reached, regardless of how much time the contractor spent reaching that goal. In turn, the State Water Board will reimburse an applicant based on performance under a performance-based contract that conforms with Article 6.5 of the Health and Safety Code. To ensure that payment is appropriate (i.e., milestones have been met), the State Water Board must review certain documentation. The applicant must submit a technical report demonstrating that the remediation milestone has been attained and the applicable regulatory agency must concur. The applicant must also submit an invoice identifying that a remediation milestone has been met along with any other information reasonably required by the State Water Board to demonstrate that the performance-based contract is consistent with article 6.5 of chapter 6.75 of the Health and Safety Code.

Subdivision (e) provides that within 60 days of receipt of a properly-documented payment request, the State Water Board will either pay the eligible costs or inform the applicant of the basis(es) for rejecting the costs. The State Water Board recognizes that many applicants may defer payment to their contractors until they are paid by the OSCA, so the State Water Board realizes the need for timely reimbursement. The State Water Board may only pay for eligible costs, however, so if the payment request is deficient and

additional information is required, the 60-day time frame will not start until the payment-request package is complete.

Subdivision (f) requires applicants to pay their consultants and contractors for costs reimbursed by the OSCA within 30 days of receiving reimbursement from the OSCA. If the applicant does not pay the contractor within the 30-day period, the applicant must return the Funds to the State Water Board immediately. It is necessary to encourage timely payment to contractors so that cleanups progress. The State Water Board recognizes, however, that applicants may have legitimate disputes with contractors and consultants performing work at the site. If the applicant decides it is necessary to withhold payment from a contractor, the applicant should not gain any benefit or use the funds for any purpose other than paying the contractor whose costs have been reimbursed by the OSCA. Thus, applicants are required to return the payment until the dispute between the applicant and the contractor is resolved.

Subdivision (g) requires an applicant to repay an overpayment to the State Water Board within 20 days of the State Water Board's request for repayment. Overpayments result from various scenarios. An overpayment may arise out of something as simple as a math or clerical error, or it could arise from a situation where the State Water Board makes a payment to an applicant, but the applicant fails to pay the applicable contractor or return it to the State Water Board.

SECTION 2814.31 – BIDDING REQUIREMENTS

Subdivision (a) requires applicants to follow applicable state laws and regulations in procuring contractor and consultant services. The OSCA program is available to public entities, which are subject to procurement rules and procedures. This regulation ensures that all applicants, including public entities, follow procurements laws. Subdivision (a) also requires that the services be obtained from qualified independent consultants and contractors. The State Water Board believes that applicants should be required to use contractors and consultants that have no relationship to anyone who stands to benefit, either directly or indirectly, from the OSCA program. These beneficiaries include the applicant, responsible parties, and prospective buyers of the eligible site. Maintaining independence between the applicant and a contractor provides a check and balance and is another tool to keep costs of response actions under control, which is necessary for a program that has limited funding.

Subdivision (b) pertains to bidding requirements for response actions that are performed pursuant to a performance-based contract under Article 6.5 of chapter 6.75 of the Health and Safety Code. Subdivision (b) requires applicants to comply with Health and Safety Code section 25299.65 (bidding process for performance-based contracts) for response actions that are performed pursuant to a performance-based contract. Cleanup activities, which include implementation of a corrective action plan, are a relatively expensive phase of the overall cleanup process. It is necessary to impose bidding requirements in an effort to control costs at OSCA-funded sites. Health and Safety Code section 25299.65 allows the State Water Board to assist with the bidding process. Specifically,

this section requires the State Water Board to advertise bid solicitations through the State Water Board's website and requires that sealed bids be sent to the State Water Board. These procedures ensure the integrity of the bidding process and fosters competitiveness, which will control response action costs at these sites.

Subdivision (c) pertains to cleanup grants where the response actions are not performed under a performance-based contract. Again, the cleanup phase, compared to the assessment phase, is a relatively expensive phase of the entire cleanup project, so it is necessary to impose bidding requirements for response actions that carry out or implement the cleanup plan. Unlike subdivision (b), subdivision (c) relates to typical time-and-materials based contracts. Subdivision (c) also requires that work contracted for after the effective date of the article must be performed by properly licensed contractors, geologists, and engineers. This is necessary to ensure that the response actions are effectively completed.

Subdivision (d) requires local governmental entities to comply with applicable public contract requirements including the requirements contained in Public Contract Code, division 2, part 3 (commencing with section 20100). This part of the Public Contract Code specifically governs contracting by local agencies and is worth highlighting. Applicants that are not local agencies may be subject to other procurement laws, and they are required to comply with applicable procurement laws under subdivision (a) of this section.

Subdivision (e) provides that the applicant is not required to submit multiple bids or proposals when submitting the initial application to the OSCA. The State Water Board expects that many OSCA applicants may not be in a position to commence with response actions unless their financial resources (including OSCA funds) are relatively certain. Thus, it may not be uncommon for applicants to delay the bidding process until they assess their likelihood of receiving OSCA funds. Also, even though an application is accepted and placed on the priority list, depending upon the demand for OSCA funds and the number of other applications, the State Water Board may not be able to commit OSCA funds to a particular applicant for a significant amount of time after approving the application. However, it is necessary for the applicant to submit bids or proposals before the State Water Board enters into a cleanup grant agreement with the applicant. The OSCA may only be used to pay reasonable and necessary costs of response actions so it is necessary to review competitive bids and proposals when the State Water Board is agreeing to a cleanup grant amount.

Subdivision (e) allows the State Water Board to waive the multiple-bid requirement if the State Water Board finds that the requirement is unnecessary, unreasonable, or impossible to comply with under the circumstances pertaining to a particular application. The State Water Board expects most applicants to comply with bidding requirements; however, there may be situations where the requirement is unnecessary or unreasonable.

SECTION 2814.23 – EFFECT OF PLACEMENT ON PRIORITY LIST; MANAGEMENT OF PRIORITY LIST AND PAYMENTS

Subdivision (a) provides that the State Water Board commits to the applicant to pay for eligible costs of response actions when the grant agreement is executed, and not when the application is deemed eligible and placed on the priority list. Applications that are determined eligible are placed on the priority list in accordance with their ranking. The State Water Board will move through the list as the level of funding provides. When the State Water Board determines that sufficient funding is available to fund a certain application, the State Water Board will notify the applicant and begin negotiating the grant. In the grant agreement, the State Water Board will commit a certain amount of funding to the applicant for the response actions covered by the grant agreement.

Subdivision (b) provides that applications on the priority list will generally be processed and paid according to the ranking of the application, but that the State Water Board may modify the ranking of applications or the order of processing, payment and approval of applications under certain circumstances. As explained earlier, applications are ranked on a first-come, first-served basis. If, however, the State Water Board determines that sufficient funding is not available to meet the demand for OSCA grants in any fiscal year, then the proposed regulations provide that the State Water Board will transition to a system that ranks applications based upon specified factors. (See proposed regulation section 2814.27, subdivision (b).) Proposed regulation 2814.32, subdivision (b) allows the State Water Board to modify the ranking of applications if the State Water Board needs to transition to the priority system described in subdivision (b) of section 2814.27.

In general, applications will be processed, approved and paid in accordance with their respective priority rankings. Cleanups proceed at different paces, though. Even though an application had a higher ranking on the priority list, a lower-ranked application may actually receive payment earlier because cleanup at the corresponding site is progressing faster. Also, there could be a delay in approving a higher ranked application because of missing documentation while lower-ranked applications are complete and able to be approved by the State Water Board. It would be inefficient to hold up approval of a lower-ranked application while waiting for information on an application that has a higher ranking.

SECTION 2814.33 – REMOVAL FROM THE PRIORITY LIST AND RESUBMISSION OF APPLICATIONS

Subdivision (a) describes the situations where an application may be removed from the priority list. Subdivision (a)(1) provides that an application may be removed if the application is not in compliance with any of the applicable requirements of article 7 (the proposed regulations), California Code of Regulations, title 23, division 3, chapter 16, Chapter 6.7 of the Health and Safety Code or any provision of the California Water Code under which the applicant is required to take response actions for an unauthorized release. At the time the State Water Board is first considering an application, the information may indicate that the application is eligible so the application is placed on the priority list. While on the list, circumstances may change that render the application ineligible (e.g., the applicant becomes affiliated with someone who caused or contributed to the

unauthorized release). This subdivision authorizes the removal of the application from the priority list if the application no longer meets all eligibility requirements of this new article. Also, this provision authorizes the State Water Board to remove an application if the applicant is subject to cleanup requirements (under Chapter 6.7 of the Health and Safety Code and implementing regulations or the Water Code) and fails to comply with them. The State Water Board expects cleanup to progress at a reasonable pace, but also realizes that the pace is sometimes dependent on financial resources.

Subdivision (a)(2) allows the State Water Board to remove an application from the priority list if the applicant fails to provide necessary documentation or information or refuses to provide access to the eligible site to a regulatory agency. If an application is on the priority list and funds are available to commit to the application, the State Water Board and applicant will begin negotiating a grant agreement. Certain information may be necessary to complete the grant agreement and if the applicant is unwilling or unable to provide the information, the State Water Board must have the authority to remove the application. There could also be situations where regulatory agencies are called upon to assist the State Water Board with verifying eligibility criteria. For example, the applicant may claim that the petroleum contamination resulted from a UST at the site rather than an existing aboveground tank and the State Water Board relies upon this and accepts the application. Because of the complexity of the site, the State Water Board may request the applicable regulatory agency to inspect the site to confirm certain factual representations made by the applicant. If the applicant refuses access to the regulatory agency thereby precluding the State Water Board from verifying certain facts, the State Water Board needs the authority to remove the application from the priority list.

Subdivision (a)(3) allows the State Water Board to remove an application from the priority list if the application contains a material error. For example, when submitting an application, the applicant may have believed and represented in good faith that the petroleum contamination resulted from a former UST at the eligible site. After the application was approved and placed on the priority list, the applicant discovers that the petroleum contamination resulted from an above ground tank at the site, which renders the application ineligible. The error on the initial application was material (changed the outcome of eligibility) and the State Water Board must have the authority to remove applications that do not actually meet eligibility requirements.

Subdivision (b) allows an applicant to resubmit an application if the applicant has corrected the condition that was the basis for removal. For example, if the applicant failed to comply with cleanup directives and its application was removed in accordance with subdivision (a)(1), the applicant may resubmit the application after coming back into compliance with cleanup directives. If the State Water Board accepts the resubmitted application, the application's priority ranking is based on the date that the State Water Board determines that the resubmitted application is eligible. Therefore, if an application is removed, it loses its initial priority and a resubmitted application will be ranked lower than complete applications that were received before the State Water Board made its determination on the resubmitted application. An applicant may not resubmit an application if the application was initially removed from the priority list because it

contained a material error and the error was a result of misrepresentation or fraud or other misconduct on the part of the applicant. If an applicant intentionally misstates material facts on an application and the State Water Board later discovers that the representations were intentional or the result of some other misconduct, the application should be barred from the OSCA program. The State Water Board will be reviewing numerous OSCA applications and must rely upon the veracity of statements and documents that comprise the application. It is necessary to discourage the submission of false statements or information in the applications.

SECTION 2814.34 – VERIFICATION OF APPLICATIONS

This proposed regulation requires the applicant to verify under penalty of perjury that all statements, documents and certifications contained in or accompanying the application are true to the best of the applicant's knowledge. This regulation also provides that if an applicant discovers information that creates a material error in any statement or document previously certified, then the applicant shall submit the new, accurate information within 20 days of discovering the new information. The State Water Board will be reviewing numerous applications and a significant amount of supporting documentation and will need to rely upon the accuracy of representations made as part of the application. It is necessary to specify that it is the applicant's duty to provide accurate information and correct any information that later turns out to be inaccurate.

SECTION 2814.35 -- INTENTIONAL OR RECKLESS ACTS; DISQUALIFICATION OF APPLICATIONS

Subdivision (a) provides that response costs that result from the gross negligence or the intentional or reckless acts of the applicant or an agent or representative of the applicant are not eligible for funding from the OSCA. OSCA funds are grant funds and they are limited (\$10 million per year for three years). They should not be used for unauthorized releases and corresponding costs that result from gross negligence or recklessness. This regulation is necessary to exclude payment for costs from the OSCA that arise out of these situations.

Subdivision (b) authorizes the State Water Board to deny any application submitted by an applicant if the applicant submitted an application to the OSCA that contained a material error that resulted from misrepresentation, fraud or other misconduct on the part of the applicant. When reviewing applications, the State Water Board must rely upon statements and information provided by applicants. If an applicant misrepresents a fact on an application for a particular site in order to create eligibility (e.g., contamination resulted from a UST rather than from the above ground tank), the actual facts (contamination stemmed from an aboveground tank) would result in ineligibility for that application anyway. In other words, there is no real penalty for misrepresenting the fact on the application. With this proposed regulation, if an applicant provided a fraudulent statement concerning a material fact on a particular application, any other applications submitted by the applicant for other unrelated sites would also be barred from

participating in the OSCA. This regulation is necessary to deter applicants from making misrepresentations to gain access to the OSCA.

SECTION 2814.36 -- OVERPAYMENT; REPAYMENT

This proposed regulation governs overpayments and repayments to the OSCA. Subdivision (a) specifies that any money paid out of the OSCA on account of material error in the application or accompanying documents shall be repaid to the OSCA. Subdivision (b) provides that any payment made to an applicant to which the applicant is not entitled constitutes an overpayment and must be repaid to the State Water Board within 20 days of written request from the State Water Board. Subdivision (c) provides that the money repaid pursuant to proposed section 2814.36 shall be deposited into the OSCA created pursuant to Health and Safety Code section 25299.50.2. It is necessary to specify that any money received from the OSCA as a result of a misrepresentation must be repaid to the OSCA and the timeframe within which applicants must repay overpayments.

SECTION 2814.37 – APPEALS

This section provides that if the State Water Board denies an application, the applicant may re-apply to the OSCA, but the applicant has no right to administratively appeal the decision. An applicant may not re-apply, however, if the previously denied application or accompanying documentation contained a material error that was a result of fraud, misrepresentation or other misconduct.

The duration of the OSCA program is short. By eliminating the administrative-appeal process, an applicant may seek judicial recourse immediately after the applicant's application is rejected by the OSCA. Health and Safety Code section 25299.56 establishes a comprehensive administrative-appeal process and procedures for judicial review. This section, however, only governs claims filed pursuant to sections 25299.57 and 25299.58 (claims to the Cleanup Fund). This proposed regulation is necessary to establish an OSCA applicant's recourse if an application is rejected by the State Water Board.

The second part of this section is consistent with other sections of the proposed regulations in that it prohibits an applicant from re-applying to the OSCA if the previously-denied application contained a material error that resulted from fraud, misrepresentation or other misconduct. It is necessary to clarify that applications rejected for these reasons are not eligible and cannot be resubmitted.